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No. 02-1328

IN THE SUPREME COURT OF THE UNITED STATES

WARREN HILLS REGIONAL SCHOOL BOARD OF EDUCATION, *et al.*,

Petitioners,

v.

THOMAS SYPNIEWSKI, JR., MATTHEW SYPNIEWSKI, and BRIAN SYPNIEWSKI, infants by their Next Friends, THOMAS and NANCY SYPNIEWSKI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is public school authorities' ban against wearing in school a T-shirt displaying a comedy routine about "redneck" sports fans violative of students' First Amendment rights, where undisputed facts establish that shirt has been worn in school numerous times without incident, and the ban is based solely on (i) the school officials' unsupported belief that the term "redneck" is offensive to minority students, and (ii) the existence of racial discord in the high school linked to the Confederate flag and a group known as the "Hicks?"

PARTIES TO THE PROCEEDING (RULE 14.1(b))

The correct respondents in this petition are Matthew Sypniewski and Brian Sypniewski, both of whom are currently enrolled in the Warren Hills school system.

The petition incorrectly lists Thomas Sypniewski as a respondent (Pet. at ii). Thomas, who commenced this lawsuit along with his two younger brothers, Matthew and Brian, was not a party to the proceedings in the United States Court of Appeals for the Third Circuit, because, having graduated from the Warren Hills Regional High School prior to the filing of that appeal, he lacked standing to appeal from the district court's denial of a preliminary injunction.

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Plaintiffs-respondents Matthew Sypniewski and Brian Sypniewski respectfully submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit of defendants-petitioners Warren Hills Regional Board of Education and that Board's various officials and members, Peter Merluzzi, Beth Godett, Ronald Griffith, Philip Chalupa, Elizabeth Ames, Marcy Matlosz, Ray Busch, Suyling Heurich, James T. Momary, Nancy Fallen, William Miller, Bradley Breslin and Scott Schantzenbach (all jointly referred to as the "Petitioners").[1]

OPINIONS BELOW

The opinion below, of the United States Court of Appeals for the Third Circuit, is reported at 307 F.3d 243 (2002) and is reproduced in the Appendix to the petition (Pet. App. at 1-66). That decision reversed the judgment entered by the United States District Court for the District of New Jersey denying Matthew and Brian Sypniewski's motion for preliminary injunctive relief. The district court's unreported memorandum opinion is dated September 4, 2001 and is reproduced in the Appendix to the petition (Pet. App. at 67-134).

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[1] As noted in the Rule 14.1(b) Statement, *supra*, plaintiff Thomas Sypniewski, who graduated from the Warren Hills Regional High School before the appeal to the Third Circuit, and thus was not a party to that appeal, is erroneously identified in the petition as a respondent in these proceedings.

COUNTERSTATEMENT OF THE CASE

Thomas, Matthew, and Brian Sypniewski, then all students at the Warren Hills schools[2] located in Washington, New Jersey, brought this action against the Petitioners challenging the constitutionality of their ban of a T-shirt featuring a comedy routine of nationally recognized comedian Jeff Foxworthy, titled "Top 10 Reasons you might be a Redneck Sports Fan if . . . ." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 250 (3d Cir. 2002). Foxworthy's humor espouses less sophistication and a return to earthier conduct.

Petitioners seek a writ of certiorari to review the judgment of the Third Circuit Court of Appeals, which held that, pursuant to this Court's decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), Petitioners' prohibition of the Foxworthy T-shirt violated the Sypniewskis' First Amendment right to freedom of speech because Petitioners did not have a well-founded fear that the shirt would cause disruption in the school. *Sypniewski*, 307 F.3d at 257-58. Despite that

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[2] Thomas Sypniewski was a student at the Warren Hills Regional High School until he graduated on June 15, 2001. Brian Sypniewski was a student at the Warren Hills Regional Middle School until June 2001, and is now a student in the High School. Matthew Sypniewksi is currently a student at the High School and the Warren County Technical School.

holding, the Third Circuit upheld the constitutionality of the school's racial harassment policy (the "Harassment Policy"), except to the extent of holding constitutionally overbroad a single provision therein which prohibited the wearing or the possession of written material that creates "ill will." *Id.* at 260-66. Petitioners assert that the Third Circuit's holding conflicts with the Tenth Circuit's decision in *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir.), *cert. denied*, 531 U.S. 825 (2000), which upheld a school's ban of the Confederate flag and, in its entirety, a similarly worded school policy (Pet. at 11-13).

The petition fails to identify a conflict between the decision of the Third Circuit and *Tinker* or any other decision of this Court. Moreover, except for the "ill will" provision of the policy, which was not material to the Third Circuit's decision to grant Matthew and Brian a preliminary injunction, the petition does not identify any conflict in the circuits as to the application of *Tinker* or its progeny. As such, the Third Circuit's decision does not warrant this Court's review and the petition should be denied.

A. The Facts

1. The Foxworthy T-shirt

The T-shirt at issue features the country humor of Jeff Foxworthy, a nationally recognized comedian who has starred in his own network television program, appeared on a television special that featured President George W. Bush, has been featured on a line of greeting cards, and has produced several comedy albums including, "You Might Be a Redneck if," "Blue Collar Comedy Tour," "Games Rednecks Play," and "Hick is Chic." *Sypniewski*, 307 F.3d at 250.

The Foxworthy T-shirt, which the Sypniewskis purchased at Wal-Mart, contains the following text (*id.* at 249-50):

> Top 10 reasons you might be a Redneck Sports Fan if . . .
>
> 10. You've ever been shirtless at a freezing football game.
>
> 9. Your carpet used to be part of a football field.
>
> 8. Your basketball hoop used to be a fishing net.
>
> 7. There's a roll of duct tape in your golf bag.
>
> 6. You know the Hooter's [sic] menu by heart.

5. Your mama is banned from the front row at wrestling matches.

4. Your bowling team has it's [sic] own fight song.

3. You think the "Bud Bowl" is real.

2. You wear a baseball cap to bed.

1. You've ever told your bookie "I was just kidding."

The Sypniewski boys wore the shirt to their respective schools in the Warren Hills Regional School District several times during the 2000-2001 school year, as Thomas Sypniewski had done several times in the high school the previous year. *Id.* at 250. As both the district court and the court of appeals acknowledged, there is no evidence that any student or administrator objected to the Foxworthy T-shirt at any time, or that the shirt caused *any* disruption, prior to Petitioners' decision to prohibit students from wearing it. *Id.*

2. The Dress Code and the Racial Harassment Policy

Student expression in the Warren Hills Regional High School and Middle School is governed by two policies adopted by Petitioners -- (i) a portion of the student handbook that proscribes, among other things, "inappropriate" clothing "portraying racial, ethnic, or religious stereotyping" (the "Dress Code"), *Sypniewski*, 307 F.3d at 250 n.6, and (ii) a

racial harassment policy adopted on March 6, 2001 (the "Harassment Policy"). *Id.* at 249.

The Harassment Policy states, in relevant part:

> District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation - White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

Id. at 249.

The Harassment Policy was adopted in response to a series of racially charged incidents in the high school. *Sypniewski*, 307 F.3d at 246. While these incidents were unfortunate, none of them involved any of the Sypniewski boys, the word "redneck," or the Foxworthy T-shirt. Indeed, the following incidents that Petitioners set forth in their opposition to the injunction motion, as leading up to the adoption of the Harassment Policy, demonstrates that there is no connection between the racial problems at the high school and the speech at issue in this case.

3. Petitioners' Showing of Racial Hostility in the High School

The first incident occurred at the high school in October 1999, when a white student, dressed up for Halloween, was suspended for appearing at school with a "black face," wearing overall jeans, a straw hat, and a thick rope around his neck tied in a noose. *Sypniewski*, 307 F.3d. at 247. During that year, a student submitted a racial harassment complaint based on several students' wearing shirts bearing the Confederate flag. Subsequently, during the 2000-2001 school year, there were increased incidents of racial discord involving students' wearing and displaying the Confederate flag. *Id.* Some even formed a "gang-like" group informally known as "the Hicks," and observed "White Power Wednesdays" by wearing Confederate flag clothing. *Id.* On one particular Wednesday, September 20, 2000, a student walked down a main hallway in the high school waving a large Confederate flag. *Id.* The flag was confiscated, but the student was not disciplined. *Id.*

This incident resulted in numerous student complaints to Ronald Griffith, a vice principal at the high school. *Id.* Troubled by these developments, Griffith conducted an investigation. He learned that some students were telling racially offensive jokes and disseminating racially offensive material downloaded from the internet. *Id.* He also learned that many students were deeply offended by

the actions of the "Hicks," and at least one student reported that he "felt like" responding violently. *Id.*

The record made by Petitioners shows that the racial tension[3] spilled over into the classroom, displacing class lessons with discussions about race relations. *Id.* But significantly, none of the students interviewed by Griffith complained of, or even mentioned, any of the Sypniewski boys, the word "redneck," or the Foxworthy T-shirt. *Id.* And while the record reflects that Thomas Sypniewski (who is not a party to these proceedings in this Court) once wore a T-shirt that had the word "redneck" embroidered with the Confederate flag (Pet. at 7-8), which he wore during the period when school authorities instructed that "students have the right to wear" it (Pet. App. at 81-82), the district court recognized that there was no evidence linking Thomas' wearing of that T-shirt with any racist incidents. (Pet. App. at 79).

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[3] In an attempt to create a tenuous link between the School Board's racial problems and the Foxworthy T-shirt, Petitioners point out that some shirts worn by students contained both the Confederate flag and the word "redneck" (Pet. at 7), ignoring that the record establishes that students' complaints and certain racial incidents related solely to the Confederate symbol, and did not even mention the word "redneck" (Pet. App. at 79).

An off-campus incident occurred on December 1, 2000, when a white student recently enrolled at the high school was physically threatened and harassed at home, apparently in response to this student's association with several black students. *Sypniewski*, 307 F.3d at 248.

White Power Wednesdays continued into 2001, as did the wearing of clothing bearing the Confederate flag. *Id.* One student came to school with a large Confederate flag draped over the back of his truck. *Id.* By February 2001, Petitioners concluded that they needed to implement a formal policy to stop the racial discord. *Id.* at 249. After researching racial harassment policies that had been adopted by other school districts, Petitioners adopted the Harassment Policy on March 6, 2001 for implementation on March 13, 2001. *Id.*

Despite the Harassment Policy, the racial incidents continued with seemingly greater frequency through the end of the 2000-2001 school year. Numerous instances of racist graffiti were found on school walls, and, on one occasion, some students played a dehumanizing, racist song from their trucks in the high school parking lot. *Id.* at 248. Near the end of the school year, a fight occurred between a black student and a white student, "not clearly . . . based on prejudice or bias" (Pet. App. at 100), which resulted in one of the students sustaining a concussion and requiring stitches. *Sypniewski*, 307 F.3d at 248.

This -- the total evidentiary record presented by Petitioners -- clearly supports (and the Sypniewskis do not dispute) that the Warren Hills Regional School District has been afflicted with racial disturbances. Significantly, however, these incidents center around the symbol of the Confederate flag and the group informally known as the "Hicks"; none of these incidents was even remotely connected to the Foxworthy T-shirt or the word "redneck."

4. The School Board's Ban of the Foxworthy T-shirt

On March 22, 2001, as he had done on numerous prior occasions without incident, Thomas Sypniewski wore the Foxworthy T-shirt to school. *Sypniewski*, 307 F.3d at 250. No one commented about the shirt until the last period of the day, when a security guard noticed the shirt and, believing that the shirt might be in violation of the Dress Code or the Harassment Policy, told Thomas that he had to report to Vice Principal Griffith's office. *Id.* at 250, 254. Vice Principal Griffith then informed Thomas that he viewed the Foxworthy T-shirt as violating the school's dress code (not the Harassment Policy at issue here). *Id.* at 250-51.

Specifically, Griffith later said that he was concerned with the word "redneck" on the shirt "because of the troubling history of racial tension at our school and the possibility that the term 'redneck' would incite some form of violence and at a minimum be offensive and harassing to our

minority population." *Id.* at 251. Based on that concern, Griffith then ordered Thomas to take off the shirt or turn it inside out. *Id.* at 251. When Thomas refused, Griffith suspended him for three days. *Id.*

The following day, Brian Sypniewski wore the identical Foxworthy T-shirt to the middle school. *Id.* In contrast to the High School principal's prior day's treatment of the T-shirt, the vice principal of the middle school told Brian that he had spoken with Superintendent Peter Merluzzi, and that they had determined that the shirt was neither offensive nor in violation of the school's dress code. *Id.*

After Superintendent Merluzzi's admission that the Foxworthy T-shirt was *not* offensive and *could* be worn by Brian in the middle school, Thomas appealed his suspension to the School Board. *Id.* at 251. In a press release dated April 20, 2001, the School Board announced its rejection of Thomas' appeal, explaining that (Pet. App. at 94):

> In a simpler time and age the use of the term redneck would not necessarily be offensive when utilized in a school setting. But where, as here, there is a history and background of racial intimidation and problems this conduct will not be permitted.

The School Board further stated that its decision was justified due to its belief that Thomas was "attempting to portray a message of racial

stereotyping," (Respondent's Appendix ["A."] at 3), relying entirely on the Dress Code, which it quoted, not on the Harassment Policy, on which Petitioner's now rely. Apparently referring to Brian's wearing of the shirt in the middle school without penalty, the School Board stated "in hindsight action should have been taken with respect to this incident as well" (Pet. App. at 94).

With the press release, the School Board made clear that all students were barred from wearing the Foxworthy T-shirt and seemingly any article of clothing that mentioned the word "redneck."

B. Course of Proceedings Below.

1. The District Court

Thomas, Matthew, and Brian Sypniewski commenced this action on June 25, 2001, in the United States District Court for the District of New Jersey, and moved for a preliminary injunction to bar Petitioners from enforcing both the Dress Code and the Harassment Policy as unconstitutional restrictions on their freedom of speech, both facially and "as applied" to the Foxworthy T-shirt (Pet. App. at 102, 118-19). Thomas also sought money damages against the defendants in their individual capacities for unlawfully suspending him in violation of his free speech rights and for state law defamation and "false light" claims. *Sypniewski*, 307 F.3d at 251-52.

The district court, by order and memorandum opinion dated September 4, 2001, denied Respondents' motion for injunctive relief. The court ruled that Petitioners had a well-founded expectation that the Foxworthy T-shirt would cause "substantial disruption" in the school because, in its view, the term "redneck" displayed on the T-shirt is "quite similar" in definition to the term "hick" -- the name of the group that organized White Power Wednesdays (Pet. App. at 127). The district court also found similarities between the term "redneck" and the Confederate flag because some students had worn T-shirts bearing both the Confederate flag and the word "redneck" (Pet. App. at 128). Based on these "similarities," the court concluded that Petitioners could constitutionally apply the Harassment Policy to prohibit the wearing of the Foxworthy T-shirt.

Moreover, although the Harassment Policy contained no requirement of a finding of "substantial disruption" before banning any clothing, the district court read that requirement into the Harassment Policy. With that addition, the court found that the Policy, which prohibited the wearing or possession of any "written material . . . that is racially divisive or creates ill will or hatred," was not unconstitutionally overbroad (Pet. App. at 115-16). The court further rejected Respondents' argument that the language in the Harassment Policy was unconstitutionally vague (Pet. App. at 117-18).

With respect to the Dress Code, however, the court held that it exceeded constitutional limits because it prohibited clothing portraying not only racial stereotyping, but also "ethnic or religious stereotyping" (Pet. App. at 113).

Matthew and Brian appealed the district court's order to the extent that the court refused to enjoin the banning of the Foxworthy T-shirt, and refused to enjoin enforcement of the Harassment Policy on its face. The court's holding the Dress Code to be unconstitutional was not raised by either side on appeal.

2. The Court of Appeals

By published opinion dated October 3, 2002, the Court of Appeals for the Third Circuit reversed the district court's denial of the preliminary injunction. The Court of Appeals held that Petitioners failed to establish a likelihood of "substantial disruption" under *Tinker* to support its ban of the Foxworthy T-shirt. *Sypniewski*, 307 F.3d at 255. The Third Circuit emphasized that the shirt had been worn to school several times without incident, and the school officials themselves determined that the shirt was not even offensive (let alone disruptive) when worn by Brian in the middle school. *Id.* at 254.

The Third Circuit also rejected the district court's view that Petitioners had a well-founded expectation of disruption due to any alleged definitional similarity between the word "redneck"

and the name "Hick" (with a capital "H") used by a group of racial troublemakers. *Id.* at 256-57. The Third Circuit held that, "[w]here a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association." *Id.* at 257. Otherwise, the circuit court reasoned, the School Board could also ban words like "hillbilly," "peasant," and the like. *Id.*

As for the district court's reliance on the "similarities" between the term "redneck" and the Confederate flag, the Third Circuit found that students wearing Confederate flag clothing wore a variety of garments, including T-shirts that contained the flag and pictures of musicians. *Id.* at 256. The circuit court correctly held that, just as this "similarity" alone would not make the musician into a prohibited symbol, the fact that certain T-shirts contained both the Confederate flag and the word "redneck" did not give school officials *carte blanche* to ban all clothing displaying the word "redneck." *Id.* As there was no suggestion in the record that any part of the Confederate flag clothing other than the flag itself had been seen as a provocative and offensive symbol, the asserted similarities did not establish a basis to connect the word "redneck" with any disruption. *Id.*

In short, the Third Circuit found no evidence that the term "redneck" had a meaning of racial intolerance and bigotry in the Warren Hills schools or caused any disruption. *Id.* at 257. To the contrary, the evidence revealed a history of

unproblematic use of the word, and that it was not associated to a significant degree with the "Hicks" or with their behavior. *Id.* Thus, because the record was devoid of any evidence that the word "redneck" was akin to a symbol identifying the "Hicks" (such as the Confederate flag), the court ruled that Matthew and Brian had established a likelihood of success on the merits that a ban of the Foxworthy T-shirt violated their First Amendment right to freedom of speech. *Id.* at 257-58.

As for Matthew's and Brian's facial challenges to the Harassment Policy, the Third Circuit affirmed the district court's holding that the Policy was not unconstitutionally vague or overbroad, except to the extent the Policy prohibited possession of materials creating "ill will." *Id.* at 264-68.

Petitioners' motion for a rehearing or, alternatively, for a rehearing *en banc*, was denied (Pet. App. at 135-36). On November 25, 2002, pursuant to the Third Circuit's mandate, the district court entered an order preliminarily enjoining Petitioners (i) from preventing the wearing of the Foxworthy T-shirt, and (ii) enforcing the Harassment Policy to the extent that the Policy prohibits the wearing or possession of any written material that creates "ill will" (A. at 4-6).

Petitioners filed their petition for a writ of certiorari on January 27, 2003, which, because their counsel was not then a member of the Bar of this Court, was not placed on the docket until March 12, 2003.

REASONS FOR DENYING THE WRIT

I

THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Respondents concur with Petitioners that two significant values were considered by the court below: (i) a school's ability to control and discipline students, *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (schools have a "compelling interest in having an undisrupted school session conducive to the students' learning"), and (ii) a student's First Amendment right to free speech, *Tinker*, 393 U.S. at 506 ("[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

But the rules of this Court mandate that, even where significant values are at issue, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. In assessing whether a petition for a writ of certiorari presents a "compelling reason" for review, this Court considers whether a United States court of appeals "has decided an important

federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Petitioners do not (nor can they) point to any decision of this Court that conflicts with the decision of the Third Circuit in this case.

Rather, the decision below, to the extent it enjoined Petitioners, was consistent with, and simply applied, this Court's seminal decision in *Tinker* which set forth the rule for reconciling these two possibly competing values of freedom of speech and prevention of school disruption.

In *Tinker*, several students were suspended for wearing black armbands to protest America's involvement in the Vietnam War. 393 U.S. at 504. Although there were no threats or acts of violence on school premises, the school officials decided to send home and suspend the protesting students based on their fear that the armbands would create a disturbance in the school. *Id.* at 508. In particular, the officials were concerned that the death of a former student in Vietnam would result in a disturbance by friends still attending the school. *Id.* at 508 n.3.

This Court rejected the school officials' position because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," and because "the record fail[ed] to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the

work of the school or impinge upon the rights of other students." *Id.* at 508-09. This Court held that a prohibition could be permitted only upon a showing that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d [744], 749 [(5th Cir. 1966)]). Because "the wearing of armbands . . . was entirely divorced from actually or potentially disruptive conduct by those participating in it" this Court struck down the school regulation prohibiting it. *Tinker*, 393 U.S. at 505-06.

> The Third Circuit's opinion is consistent with *Tinker's* requirement that that there must be a showing of facts leading to a well-founded fear of substantial disruption. In this case, there is no assertion of any facts that would allow a conclusion that the word "redneck" on the Foxworthy T-shirt could cause disruption. Indeed, the facts,[4] without contradiction,

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[4] Petitioners' list of factual examples of racial disturbances in the school (Pet. at 6-7) are inapposite. None of these examples involved the word "redneck." Moreover, the School Board's assertion that the group known as the "Hicks" was also known as the "Rednecks" was made without any supporting evidence (Pet. at 6 n.1).

established that the Foxworthy T-shirt was worn without *any* disruption. *Sypniewski*, 307 F.3d at 250-51. The Foxworthy T-shirt had been worn several times in both the high school and middle school without causing any disruption (much less disruption that was "substantial"). *Id.* at 254. Moreover, on the day Thomas Sypniewski was suspended for wearing the shirt, the shirt created no disruption in the high school for the entire day; Thomas was sent to the Vice Principal's office in the last hour not because of any disruption, but because of a security guard's view that the shirt might violate the Dress Code or the Harassment Policy. *Id.* The court of appeals also emphasized that, the day after Thomas' suspension, the school officials themselves determined the shirt was not offensive when worn by Brian Sypniewski in the middle school. *Id.*[5] Correctly applying the

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[5] Petitioners, at this stage, belatedly contest the fact, undisputed in the record (Pet. App. at 67), that the Foxworthy T-shirt was worn several times without incident. Their attempt to manufacture issues of fact at this stage is unavailing, particularly as Petitioners represented to the District Court that no evidentiary hearing was required as there were no disputed issues of fact (Pet. App. at 67). In any event, it is noteworthy that, if Petitioners were correct, any determinative contested factual issue would likely preclude this Court's review.

test in *Tinker*, therefore, the Third Circuit struck down the School Board's ban of the Foxworthy T-shirt as violative of the First Amendment.[6]

Consistent with *Tinker*, the Third Circuit did not end its analysis with the undisputed absence of disruption from any prior wearing of the T-shirt. Rather, it continued to consider whether Petitioners had any reasonable basis to conclude that disruption in the future was likely. While accepting that the record showed a history of racial discord in the high school connected to displaying the Confederate flag and to a group known as the "Hicks," there was no "evidence that the school authorities had reason to anticipate that the wearing of the [Foxworthy T-shirt or the word "redneck"] would substantially interfere with the work of the school or impinge upon the rights of other students." – *Tinker*, 393 U.S. at 509. In addition to the history of unproblematic use of the word "redneck" in the Warren Hills schools, *Sypniewski* 307 F.3d at 257, the court concluded that, at most, the term "redneck" might at some

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[6] Petitioners cite at page 12 of their Petition *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (involving, respectively, vulgar speech and school-sponsored expression), but thereafter admit that neither case is relevant (Pet. at 13 n. 6).

point come to be offensive, *id.*, and thus Petitioners had nothing more than an "undifferentiated fear or remote apprehension of disturbance," *id.*, which does not meet the *Tinker* requirement that conduct "materially disrupt" classwork or involve "substantial disorder." *Tinker*, 393 U.S. at 513.[7]

Accordingly, because the Third Circuit's decision does not conflict with any decision of this Court, review of this case is not warranted.

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[7] Petitioners totally misconstrue the Third Circuit opinion in arguing that, by holding that the Warren Hills schools could not constitutionally ban the Foxworthy T-shirt, the Third Circuit "makes it almost impossible for a school administrator to prohibit any school speech unless that same speech caused substantial disruption in the past" (Pet. at 17). In fact, the Third Circuit held directly to the contrary: "The high school was likely justified in disciplining the student dressed in black face, wearing a rope around his neck, whether or not they could point to anything similar in the past. The Foxworthy T-shirt, however, is clearly not in this category. It is essentially harmless on its face." *Sypniewski*, 307 F.3d at 255 n.11. In any event, the issue before this Court is whether the Third Circuit's holding was consistent with *Tinker* and its progeny, which it was.

POINT II

THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

Petitioners argue that this Court should grant certiorari because the Third Circuit's holding is in conflict with the 2000 decision of the Tenth Circuit in *West* (Pet. at 18-20). In *West v. Derby Unified Sch. Dist. No. 260,* a Kansas middle school student was suspended for drawing a Confederate flag on a piece of paper during math class in violation of a substantially identical racial harassment policy upheld by that court. 206 F.3d 1358, 1363 (10th Cir.), *cert. denied,* 531 U.S. 825 (2000).

There is no conflict between *West* and the Third Circuit decision on all holdings determinative of the Third Circuit decision here. Both the Tenth Circuit and the Third Circuit applied *Tinker's* "substantial disruption" test in coming to their respective conclusions. Specifically, the *West* court upheld the Kansas school's prohibition of the Confederate flag because that symbol had been at the center of the school's racial discord. Applying the same *Tinker* test, the Third Circuit found that there was no evidence of disruption associated with the Foxworthy T-shirt, thus precluding the T-shirt ban.

If this case had also involved a challenge to the Confederate flag, the results of the two cases would have been the same. As the Third Circuit

explained, the "District Court's factual findings would likely support a ban of displays of the Confederate flag under *Tinker*. . . . But Plaintiffs have not challenged a ban on the Confederate flag; they challenge the banning of a T-shirt that bore no Confederate flag and had no similarly disruptive history." *Sypniewski*, 307 F.3d at 254. Accordingly, the considerable factual distinctions between the two cases -- as well as the Third Circuit's own analysis on how the two cases differ -- demonstrates that there is no conflict between the Third Circuit decision here and the Tenth Circuit decision in *West*.

Contrary to Petitioners' erroneous assertion (Pet. at 15-16), the Third Circuit's application of the *Tinker* disruption test is not only consistent with *West*, but is also consistent with other federal courts that have made clear that *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance. *See, e.g., Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (reversing summary judgment for school officials who had attempted to ban a Hank Williams, Jr. concert T-shirt displaying two Confederate flags, holding that such a ban would be unconstitutional if "there were no prior disruptive altercations as a result of Confederate flags"); *Denno v. Sch. Bd.*, 182 F.3d 780, 785 (11th Cir. 1999) (noting the absence of any facts in the complaint that "would suggest a reasonable fear of disruption"), *vacated and decided on separate grounds*, 218 F.3d 1267 (11th Cir. 2000); *see also Chambers v. Babbitt*, 145 F. Supp.

2d 1068, 1071-74 (D. Minn. 2001) (preliminarily enjoining school officials from banning "Straight Pride" sweatshirts, and holding that, under *Tinker*, public schools cannot silence student speech simply because there has been disruption *unrelated* to the speech); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455-58 (W.D. Pa. 2001) (student had a First Amendment right to compile a demeaning "Top Ten" list about his school's athletic director where the student's previous lists had caused no disruption); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 665-67 (S.D. Tex. 1997) (students could not be prevented from wearing rosaries, despite school's ban on "gang-related" attire, where the students, who were not part of a gang, had worn the rosaries for months without incident).

Moreover, Petitioners' argument that the Third Circuit's "well-founded fear of genuine disruption" is a "new creation" rather than an application of this Court's standard in *Tinker* (Pet. at 17) has no merit. The Third Circuit's test is the same test defined in *Tinker* which requires that a school have "evidence" and "reason to anticipate that the [speech] would substantially interfere with the work of the school." *Tinker*, 393 U.S. at 509. In fact, "well-founded" (the phrase used by the Third Circuit) means "*based on* excellent *reasoning*, information, judgment, or *grounds*." *Merriam Webster's New Collegiate Dictionary* 1342 (10th ed. 1996) (emphasis added). Obviously, the mere use of synonyms does not create a new standard.

The only portion of Third Circuit's decision that is in conflict with the Tenth's Circuit's decision in *West* relates to the prohibition in the Harassment Policy against possessing any written material that "creates ill will." *West* upheld this prohibition against a facially overbroad challenge, while the Third Circuit here struck it as facially overbroad. This conflict between the two circuits, however, is not material to the Third Circuit's decision enjoining Petitioners from violating Respondents' first amendment right by banning the Foxworthy T-shirt. That decision was not based on the overbreadth of the "ill-will" provision, but on Petitioners' failure to fulfill the *Tinker* disruption requirement. Hence, the Third Circuit would have granted the injunction against banning the Foxworthy T-shirt without this conflict.[8]

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[8] In addition, the Third Circuit factored in New Jersey state law in its decision that the "ill will" provision was overbroad. The Third Circuit noted that New Jersey law prohibited "expression that constitutes 'disorderly conduct'" and "can result in discipline including suspension" so that "most racially hostile conduct could be regulated and punished even without a racial harassment speech code, so long as it is disruptive." *Sypniewski*, 307 F.3d at 259. The Third Circuit's consideration of state law, in its determination that the "ill will" provision of the Harassment Policy was overbroad, further militates against the grant of certiorari in this case.

CONCLUSION

For the above reasons, the Court should deny the petition for a writ of certiorari.

Dated: April 10, 2003

Respectfully submitted,

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* (COUNSEL OF RECORD)

[Fax lines Omitted]

Findings by the Warren Hills Regional Board of Education

On March 26, 2001 the Board of Education of the Warren Hills Regional School District received an Appeal from a Senior student in which that student stated he was wrongfully suspended for wearing a t-shirt imprinted with the term "redneck" to school on March 22, 2001. The Board has received and considered the Appeal and materials presented by the Superintendent regarding this incident. The Board hereby denies the Appeal and upholds the three (3) day suspension of the student in question.

The Warren Hills student body consists of, at the Senior High School, 1,200 students. The student body is largely white with less that five (5%) per cent of the student body being African American. Over the past two school years there has been an unfortunate series of incidents in which a small but verbal and visible minority of the white population has engaged in a course of conduct of harassment and verbal abuse of students of African American origin. Attached to this Decision is a chronology of those events which culminated in the adoption of a Racial Harassment Intimidation Policy by the Board earlier this school year and has led to a heightened awareness on the part of the administration, teaching staff and the vast majority of the students of the District of the sensitivities of minorities. While some of the incidents in question were directed at Asian Americans the Board is aware of and concerned about the climate of racial harassment and intimidation practiced by certain students in the District.

With the forgoing as a background the student in question was found to be wearing a shirt bearing the term "redneck" on it. The specifics of the incident are as set forth in the report dated March 22, 2001 received by the Board on March 27th. (See Exhibit "A" attached hereto)

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That the student intended his shirt to convey a message is confirmed by the report of a School Resource officer and the student's statement to the effect "I have been waiting all day for someone to notice".

The administration handled this disciplinary action based upon the guidelines for behaviors set forth in the Student Handbook, a copy of which has been distributed to each student at the beginning of the school year. Specifically, the discipline resulted from the insubordination of the student in failing to follow the school's dress code and for insubordination after being directed to follow same. The portion of the code utilized by the Administration is as follows:

> "The following is considered inappropriate for school: (a) clothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs and tobacco), or portraying racial, ethnic, or religious stereotyping."

The Board is satisfied that the actions of the Administration, given the background and context in which it is placed, was entirely appropriate. Moreover, the statement by the student indicating he was intending to be noticed corroborates the fact that he

was attempting to portray a message of racial stereotyping. Given the climate and background it was entirely appropriate for the Administration to take the action which it took. The student in question points out that another student wearing a virtually identical shirt was brought to the attention of the Administration at the Middle School and that no action was taken. The Administration acknowledges that in hindsight action should have been taken with respect to this incident as well. The Board understands and is supportive of the difficulties in making these case by case decisions but

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wishes to establish clearly and without equivocation that in the future any conduct which is violative of either the Dress Code or the Racial Discrimination Code is not welcome at any of the Warren Hills Regional Schools and because of the history of racial intimidation, this behavior will not be tolerated. In a simpler time and age the use of the term redneck would not necessarily be offensive when utilized in a school setting. But where, as here, there is a history and background of racial intimidation and problems this conduct will not be permitted.

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ORIGINAL FILED
NOV 25 2002

WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

THOMAS SYPNIEWSKI, JR., MATTHEW SYPNIEWSKI, and BRIAN SYPNIEWSKI,

Plaintiffs,

- against -

WARREN HILLS REGIONAL BOARD OF EDUCATION, PETER MERLUZZI, in his personal and official capacity as Superintendent of the Warren Hills Regional Board of Education, BETH GODETT, in her personal and official capacity as Principal of the Warren Hills Regional High School, RONALD GRIFFITH and PHILIP CHALUPA, in their personal and official capacity as Vice Principals of the Warren Hills Regional High School, and ELIZABETH AMES, MARCY MATLOSZ, RAY BUSCH, SUYLING HEURICH, JAMES T. MOMARY, NANCY FALLEN, WILLIAM MILLER, BRADLEY BRESLIN and SCOTT SCHANTZENBACH, in their official capacity as members of the Warren Hills Regional Board of Education,

Defendants.

Index No.
01 CV 3061
(MLC)

ORDER ON THE MANDATE FOR PRELIMINARY INJUNCTION

ENTERED
ON
THE DOCKET
ON 11/25/02
WILLIAM T.
WALSH,
CLERK
By DS
(Deputy Clerk)

Plaintiffs Matthew Sypniewski and Brian Sypniewski having moved this Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction restraining the Defendants in this action from enforcing certain policies, and the District Court having entered an order on September 7, 2001 denying Plaintiffs' motion for a preliminary injunction, and the United States Court of Appeals for the Third Circuit having certified judgment reversing the District Court's order to the extent that (i) the District Court's order refused to enjoin application of the racial harassment policy adopted by the Warren Hills Regional Board of Education on

[Page2]

March 6, 2001 (the "Harassment Policy") to Plaintiffs' T-shirt reading, "Top 10 Reasons you might be a Redneck Sports Fan if ..." (the "Foxworthy T-shirt"), and (ii) the District Court's order permitted further enforcement of the Harassment Policy's "ill will" provision;

IT IS on this 22nd day of November 2002,

ORDERED that, until final disposition of this matter or until further order of the Court, an injunction be and is hereby entered against Defendants barring enforcement of the portion of the student handbook adopted by the Warren Hills Regional Board of Education that proscribes "inappropriate" clothing (the "Dress Code") to the extent that it prohibits clothing "portraying racial, ethnic, or religious stereotyping" without requiring evidence that the particular clothing being prohibited

causes disruption in the school and/or interferes with the rights of others; and it is further

ORDERED that, until final disposition of this matter or until further order of the Court, an injunction be and is hereby entered against Defendants barring enforcement of the Harassment Policy, to the extent that it prohibits the wearing or possession of any "written material ... that ... creates ill will;" and it is further

ORDERED that, until final disposition of this matter or until further order of the Court, an injunction be and is hereby entered against Defendants from preventing or attempting to prevent the wearing of the Foxworthy T-shirt to Defendants' schools and from taking any disciplinary action against the wearing of the Foxworthy T-shirt.

The security bond requirement of Rule 65(c) of the Federal Rules of Civil Procedure is hereby waived. The plaintiffs shall not be required to post a bond.

s/ Mary L. Cooper
Hon. Mary L. Cooper, U.S.D.J.